Date: January 22, 1998

Case No.: 95-INA-00693

In the Matter of:

HOGS ON THE HILL,
Employer

On Behalf Of:

MUHAMMAD MALIK,
Alien

Appearance: Robert M. Price, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 8, 1994, Hogs on the Hill ("Employer") filed an application for labor certification to enable Malik Muhammad ("Alien") to fill the position of Cook (AF 21). The job duties for the position are:

> Prepares, seasons and cooks meats, vegetables and foodstuffs according to the menu. Measures and mixes ingredients according to recipe using variety of kitchen equipment. Washes, peels and cuts vegetables. Manages the staff and cash deposits.

The requirements for the position are two years of experience in the job offered. Other Special Requirements are:

> Wed. 2:00 p.m. to 10:00 p.m.
> Thurs. 4:00 p.m. to 10:00 p.m.
> Fri.-Sat., 3:00 p.m. to 11:00 p.m.
> Sunday 10:00 a.m. to 8:00 p.m.
>
> Employer checks references.
> Willingness to work any shifts as required by the employer.

The CO issued a Notice of Findings on May 4, 1995 (AF 16-18), proposing to deny certification on the grounds that the requirement of two years of experience was excessive for the position of Cook, Fast Food, as defined in the *Dictionary of Occupational Titles* ("DOT") in violation of 20 C.F.R. § 656.21(b)(2). The CO notified the Employer that it could rebut the findings by submitting evidence to establish that the requirement arises from a business necessity, or reduce the requirement to the DOT standard, amend the application, and readvertise.

In its rebuttal, dated May 30, 1995 (AF 12-15), the Employer contended that the experience requirement of two years is not excessive as,

> The employer needs a cook who can select the right meat, cut it and cook it according. The cook also needs to know how to make the sauces for each order; the employer requires that the sauces be made from scratch instead of using one

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

> that comes in a jar. . .. The restaurant's reputation rides on the ability of the cook. The employer cannot afford to stain his reputation by hiring someone who is a fast food worker and lacks two years experience required as a cook. . .. The employer is registered in Virginia as a restaurant instead of a fast food place.

The Employer also submitted a menu and the Alien's 1965 certificate of vocational training in cooking/baking/sauce making from his High School in Lahore.

The CO issued the Final Determination on July 17, 1995 (AF 9), denying certification because, based on the Employer's menu, the position is most like that of a Cook, Fast Food, and the two years of experience requirement is excessive in violation of § 656.21(b)(2).

On August 21, 1995, Employer's Counsel requested an extension of time to file an appeal (AF 8). On August 23, 1995, the CO responded that it could not grant any extensions (AF 7). On December 15, 1995, the Board decided to accept jurisdiction over the case, and on January 31, 1996, the record was forwarded to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On March 12, 1996, the Employer submitted Petitioner's Brief for Review of the Denial of Labor Certification.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd*., 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the DOT, or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish business necessity for the requirement.

In this case, the CO notified the Employer that the requirement of two years of experience was excessive for the position of "Cook, Fast Food" as defined in the DOT. The Employer argues that the position is not that of a fast food cook, and the two years of experience requirement is a business necessary based on the duties required; *i.e.*, selecting and cutting meat and making sauces, and because a cook with lesser experience could damage the Employer's reputation.

The Employer's menu consists of BBQ rib and BBQ chicken sandwiches, subs, and platters, and a small number of side orders. All of the other positions of specialty "Cooks" in the DOT that require two to four years of experience contain a number of duties that are not required of the Employer's Cook. See DOT at 313.361-014, 313.381-022. We agree with the CO that the position is best defined as a "Cook, Fast Food" in the DOT. See *LDS Hospital*, 87-INA-558 (Apr. 11, 1989) (*en banc*); *Mega Nursing Services, Inc.*, 93-INA-105 (Apr. 6, 1994).

To establish the business necessity of the requirement, the Employer must show that the requirement bears a reasonable relationship to the occupation in the context of the Employer's

business, and the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). In this case, it is not a question of whether experience as a Cook is required, but whether two years of experience as a Cook is a business necessity versus six months to one year of experience as a Cook. While the Employer has submitted a written statement that must be considered, that statement does not address how a Cook with six months to one year of experience could not select, cut, and cook ribs and chicken, and make BBQ sauces. *ARCO Oil & Gas Company*, 89-INA-295 (May 22, 1995). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 90-INA-387 (July 30, 1991).

Accordingly, we find that the Employer has not adequately documented the business necessity of its requirement of two years of experience. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.